Supreme Court, U.S.
FILED

05-112 MAY 16 2005

NO. OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

October Term 2005

JACK R. FINNEGAN, Petitioner

v.

RICHARD DE FRANCISCO, et al., Respondent

ON WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Jack R. Finnegan
In pro se
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San Clemente, CA
949-492-3837

QUESTION PRESENTED

1. Can anyone possibly say that purposely attempting to destroy the rights of petitioner or destroying petitioner's case in a courthouse by failure to be faithful to established law is not an attack on our system of law?

2. Was it reversible error for petitioner to be denied the right of due process, and equal protection of the laws of the State of California, the California State Constitution and the United States Constitution?

3. Did the California Supreme Court, deprived petitioner the right of due process, and equal protection of the laws in a rush to judgment by refusing to hear petitioner's Petition for Review, when the Appellate court omitted and misstated material facts in the petitioner's brief?

4. Did the California Supreme Court, deprived petitioner the right of due process, and equal protection of the laws in a rush to judgment by refusing to hear petitioner's Petition for Review, when the Appellate court failed to mention material facts in the petitioner's brief?

5. Did the California Supreme Court, deprived petitioner the right of due process, and equal protection of the laws in a rush to judgment by refusing to hear petitioner's Petition for Review, when the Appellate court raised new issues without affording petitioner to file a supplemental brief.

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TABLE OF AUTHORITIES

California Rules of Court, Rule 29(b)

California Government Code §68081

San Francisco v. Pacific Bank (1891) 89 Cal. 23, 25, 26 P. 615, 835

In Regards Jessup (1889)81 Cal. 408, 471-472, 21 P. 976, 22 P. 742, 1028

Louisell and Degan, Rehearing in American Appellate Courts, 44 Calif.. L. Rev. 627 (1956)

APPENDIX

APPENDIX A The final judgment of the California Supreme Court.

APPENDIX B The denial for rehearing in the Court of Appeal, State of California, Fourth Appellate District, Division Three.

APPENDIX C The Opinion of the Court of Appeal, State of California, Fourth Appellate District, Division Three.

OPINIONS BELOW

The final judgment of the California Supreme Court was entered on February 16, 2005. The denial for rehearing in the Court of Appeal, State of California, Fourth Appellate District, Division Three, was entered December 10, 2004. The Opinion of the Court of Appeal, State of California, Fourth Appellate District, Division Three, was entered November 12, 2004

JURISDICTION

The jurisdiction of this Court rests with Title 28 United States Code Section 2104.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Constitution Article III, Section 2, The Judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, and the Laws of the United States;...

Fifth Amendment. No person shall be... nor be deprived of life, liberty, or property, without due process of law;...

Fourteenth Amendment. No persons born... deprive any person...without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

California Rules of Court, Rule 29(b) provides for rehearing on any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, or any misstatement by the Court of Appeal of any issue or material fact, or the court's failure to mention an issue or material fact.

California Government Code § 68081, If the court fails to afford the opportunity, a rehearing is required to be ordered on timely petition of any party.

STATEMENT OF THE CASE

HISTORY OF THE LITIGATION

This lawsuit began as a direct result of an upper landowner diverting the natural water flow onto the lower landowner's property causing two landslides, approximately 30 months apart. The first lawsuit was improvidently and improperly dismissed. The second lawsuit was destroyed 18 days before trial when a non-trial judge exceeding his authority to do so improvidently and improperly excluded the expert testimony of petitioner, a licensed Architect, licensed General Contractor with over 50 years of experience.

FEDERAL QUESTIONS

The federal question of Constitutional basic and fundamental right of due process and equal protection of the laws was first raised in each of the two cases during pretrial procedures.

The federal question of Constitutional basic and fundamental right of due process and equal protection of the laws was first raised in each of the two cases before the Appellate Court.

The federal question of Constitutional basic and fundamental right of due process and equal protection of the laws was first raised in each of the two cases before the California Supreme Court.

REASONS FOR GRANTING THE WRIT

The petition should be granted because this case presents the important issue of equal justice under the law being denied and because a most basic and fundamental right of due process and equal protection of laws to obtain justice arising from certain remedy in the law have been denied.

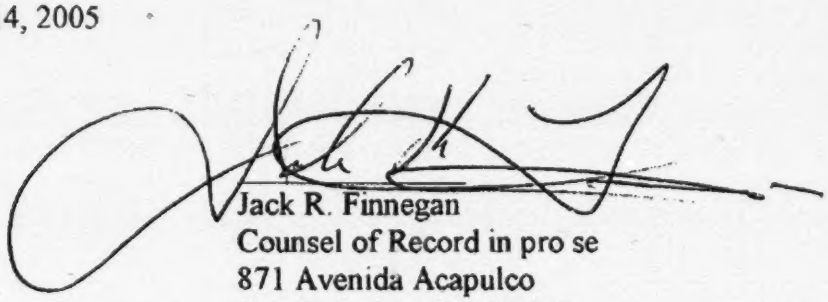
CONCLUSION

The preamble of the Code of Judicial Ethics requires no less than the Constitutional issue of due process and equal protection of laws under the Fifth and Fourteenth Amendments. "Our system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to this code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible member of government under the rule of law."

Wherefore, it is respectfully submitted that the judgment of the court below should be reversed and the cause remanded to California Superior Court for trial on merit.

Respectfully submitted

May 14, 2005



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SUPREME COURT OF THE UNITED STATES

October Term 2005

JACK R. FINNEGAN, Petitioner

v.

RICHARD DE FRANCISCO, et al., Respondent

CERTIFICATION OF COMPLIANCE

The Petition for Writ of Certiorari is proportionately spaced, of Roman type, 11 point type size, with at least 2-point leading between lines and a word count of 1,016 words, margins of 1.0" each side, 1.125" at top and 1.0 at the bottom. The paper is white, at least 60-pound weight.

May 14, 2005

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APPENDIX A

Court of Appeal, Fourth Appellate District,
Division Three - No. G032847
SI 30139

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JACK R. FINNEGAN, Plaintiff and Appellant,

v.

RICHARD DE FRANCISCO ET AL., Defendants and Respondents.

Petition for review DENIED.

SUPREME COURT
FILED
FEB 16 2005
Frederick K. Ohlrich
Clerk

GEORGE
Chief Justice

APPENDIX B

COURT OF APPEAL - STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

COURT OF APPEAL 4th DIST DIV 3
FILED
DEC 10 2004
Deputy Clerk

JACK R. FINNEGAN,
Plaintiff and Appellant,

v.

RICHARD DeFRANCISCO et al.,
Defendants and Respondents.

G032847

Sup. Ct. No.794705

ORDER

The petition for rehearing is DENIED.

SILLS, P.J.

WE CONCUR:

ARONSON, J.

IKOLA, J.

APPENDIX C

FILED
NOV 12 2004
Deputy Clerk

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

JACK R. FINNEGAN,
Plaintiff and Appellant, G032847

v. (Super. Ct. No.794705)

RICHARD DE FRANCISCO, et al., OPINION
Defendants and Respondents.

Appeal from a judgment of the Superior Court of Orange County, Gregory H. Lewis, Judge. Affirmed.

Jack R. Finnegan, in pro per for Plaintiff and Appellant.

Callahan, McCune & Willis and James M. Hansen for Defendants and Respondents.

I. INTRODUCTION

Appellant Jack R. Finnegan presents a series of challenges to the dismissal of his case for not bringing it to trial in five years.

(See Code Civ. Proc., § 583.310 ["An action shall be brought to trial within five years after the action is *commenced* against the defendant."].)

The case was filed May 26, 1998. We will call it the "1998 case." The main problem is that in the summer of 1999, a year after the case was filed, Finnegan's lawyer apparently sank into an emotional depression and neglected the case from there on out. Finnegan woke up to the danger of losing the case in 2002, while there was still time to bring it to trial. However, instead of moving the 1998 case to trial, Finnegan pinned his hopes on filing, in 2002, *another*, virtually identical case. We will call that case the "2002 case." And the strategy worked. The 2002 case *did* go to trial on the merits. (Finnegan's substantive loss on that one is the subject of a companion appeal, G033230.) However, the 1998 case continued to be neglected.

We find none of Finnegan's challenges to the dismissal of the 1998 case meritorious.[1] The most salient fact is that Finnegan himself did nothing to bring the case to trial even though he had over a year to do it after realizing his lawyer was neglecting the case. (See *Wilshire Bundy Corp. V. Auerbach* (1991) 228 Cal.App.3d 1280.)

II. FACTS

On May 26, 1998, Finnegan filed Orange County Superior Court case number 794705 as a pro per against his up-slope neighbors, the De Franciscos. Finnegan claimed various damages to his property resulting from excessive down-hill water flow originating on the De Francisco's property.

Finnegan's original complaint was unclear, but he kept on trying. After his second amended complaint was successfully demurred to, he obtained the services of an attorney, Bruce A. Thomason. Thomason filed a third amended complaint in July 1999

1 The motion to dismiss the appeal as too late is denied. The dismissal of the 1998 was embodied in an unsigned ruling posted via the Internet which became the final ruling of the court via an oral order made July 7, 2003. So, even though the notice of appeal was filed September 15, 2003, technically it was premature, not too late, because there was still no